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No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION AND NORTH SHORE COMMUTERS ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM OF CHICAGO NORTH SHORE AND MILWAUKEE RAILWAY, APPELLEE

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Appellee, Chicago North Shore and Milwaukee Railway moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment and decree of a three-judge district court dismissing a complaint which sought to enjoin and set aside the enforcement of an order of the Interstate Commerce Commission issued May 10, 1962 and served May 18, 1962 and as reaffirmed by subsequent order of said Commission on October 15, 1962. Pursuant to the statutory authority conferred on the Interstate Commerce Commission by virtue of paragraphs (18), (19), (20) of §1 of the Interstate Commerce Act, and after proceedings extending for more than four years, the Commission granted to the Appellee a certificate of public convenience and necessity, authorizing the Appellee to abandon the operation of its entire line of railroad operated

between terminals in Milwaukee, Wisconsin and Chicago, Illinois, and located in Milwaukee, Racine and Kenosha Counties, Wisconsin and in Lake and Cook Counties, Illinois. The certificate was made subject to a condition, imposed by the Commission, requiring the Appellee to sell the line, or any part thereof, to anyone willing, prior to the effective date of the Commission's order, to purchase the same for further operation at its fair net salvage value. No offer to purchase, complying with the Commission's order, was ever made. No temporary restraining order or temporary injunction was sought by Appellants or issued by the district court. The decree of the district court dismissing the complaint was entered December 10, 1962. Appellee terminated its operations January 21, 1963.

Statutory Authority:—Paragraphs (18), (19) and (20) of § 1 of the Interstate Commerce Act (the texts whereof are set out in the page margin*) provide that no interstate

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* §1, par. (18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment (Title 49—USCA—Transportation p. 1).

§1, par. (19) *Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings.

railroad may abandon its line of railroad until a certificate of public convenience and necessity has been obtained from the Interstate Commerce Commission. The Act also provides that after the issuance of the certificate no further approval

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Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates (Title 49—USCA—Transportation p. 1).

§1, par. (20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both (Title 49—USCA—Transportation p. 1).

other than such certificate is required and the carrier may retire from business.

Prior Decisions of This Court—The jurisdiction of the Interstate Commerce Commission with respect to the issuance of certificates of public convenience and necessity authorizing the abandonment of interstate carriers and the manner in which such jurisdiction shall be exercised, has been considered and decided by this Court in several decisions and may no longer be fairly considered as open to debate. These decisions are: *Colorado* v. *United States,* 271 U.S. 153; *Transit Commission* v. *United States,* 284 U.S. 360; and *City of Yonkers* v. *United States,* 320 U.S. 685; *City of Yonkers* v. *United States,* 323 U.S. 675. The decisions in the *Colorado* and *Transit Commission* cases decided that the Commission's authority to issue such certificates derived from the power of Congress to regulate interstate commerce; that such certificates issued as an incident to such regulation; that the power of the Congress over interstate commerce was plenary and exclusive; that even where the segments of road the operation of which were sought to be abandoned lay entirely within the territorial limits of a single state the Commission was authorized to issue such a certificate to an interstate railroad after balancing the respective interests and determining what fairness to all concerned required. The decisions in the *Yonkers* cases are particularly applicable to this appeal. The first *Yonkers* case decided that whether or not a given railroad is exempted from the Act involves a mixed question of fact and law in which it is essential that the basic jurisdictional findings with respect to the character of railroad involved should be first made by the Interstate Commerce Commission as an aid to the court since the Commission "has a special competence to deal with the transportation problems which are reflected in these questions" (320 U.S. 685, 691). That case was remanded for further findings. Such further find-

ings being made by the Commission, on the second appeal this Court concluded that the findings were sufficient to support the order and the evidence sufficient to support the findings. (323 U.S. 675) The Commission has made such findings in the case at bar. For convenience of the reader an appendix to this motion contains the reports of the Commission with respect to this case.

The Facts—Appellee operated a commercial interstate railroad, double tracked and built to standard railroad specifications, over a total of 107 miles in the southern part of Wisconsin and northern part of Illinois. The northern terminal of the railroad was located at Milwaukee, Wisconsin; the southern terminal at Chicago, Illinois. The railroad carried both passengers and freight in interstate commerce across the state line between the states of Wisconsin and Illinois. Though passenger traffic revenue predominated, Appellee's rail system was physically connected at six different points in Wisconsin and Illinois with the railroad tracks of four other interstate railroads for the transportation of freight moving in interstate commerce. The tributary territory through which the Appellee operated is also served by two other interstate railroads, i.e., The Milwaukee Road and The North Western, operating adjacent to Appellee, by an interstate motor bus carrier, The Greyhound Corporation, and by many local bus lines and highways. The railroad had been regulated in one way or another as an interstate carrier by the Interstate Commerce Commission ever since the Transportation Act of 1920. Other relevant features of the railroad are briefly mentioned in the Argument *post* pages 10 to 12.

The railroad operated by Appellee has sustained annually large and substantial financial losses extending back many years. Every year during the 27-year period embraced by the years 1932-1958 the railroad sustained large and substantial annual losses — except during the years of World

War II when the use of the automobile was curtailed. For fourteen years (1932-1946) the railroad was in the custody of and operated by receivers—and later trustees—for the district court at Chicago. The property was reorganized in late 1946 and discharged from the district court. Under a Plan of Reorganization the railroad was turned over to the mortgage bond holders for operation. Unsecured claims aggregating in excess of $7,000,000 and the stockholders' equity were entirely wiped out. Patronage on the railroad continued to decline. Financial losses continued to occur, notwithstanding the abandonment of a branch route which was authorized by the Interstate Commerce Commission on May 19, 1955. (*In Re Chicago North Shore and Milwaukee Railway Abandonment*, 290 ICC 765.) Particular attention is directed to pages 771-780 of that report of the Commission.

On June 25, 1958 Appellee made application to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to entirely retire from business. The application was opposed by labor organizations representing Appellee's employees, some municipalities, by various persons, firms and corporations in Wisconsin and Illinois, by the Public Service Commission of Wisconsin and by Appellants. Hearings were conducted by an Examiner. The Examiner recommended that the application be granted subject to a condition (usually imposed by the Commission) requiring sale of the property at its fair net salvage value to any responsible agency willing to continue further operation. Exceptions were filed to the Examiner's Report. Thereafter oral argument was heard by the full Commission. The Commission then entered an interim report (1) overruling objections to the jurisdiction of the Commission and holding Appellee to be a commercial interstate railroad and (2) requiring Appellee to try out an increase in its passenger fares, which, it was

insisted by Appellants, would solve Appellee's difficulties, and (3) to continue in operation for the trial period of one year (312 ICC 99). But Appellee's financial condition continued to greatly worsen. The Commission held further hearings in 1961. A further lengthy supplemental record was compiled. Every conceivable aspect of Appellee's operation was thoroughly and fully inquired into. Altogether the record in this case consists of over 3100 pages of testimony and some 207 exhibits. The full Commission again heard the parties at oral argument. On May 10, 1962 the Commission entered an order authorizing the issuance of a certificate. Appellants filed a petition for reconsideration. Upon reconsideration the findings of the prior report were supplemented and affirmed. The certificate was modified to provide for a method of arbitrating the fair net salvage value in the event a proper offer to purchase were made in apt time (317 ICC 191).

On June 11, 1962 Appellants filed a bill of complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin and set aside the Commission's order of May 10, 1962. The complaint was later amended and supplemented and answers filed. The case was then heard by a three-judge court, which entered the decree appealed from.

ARGUMENT

This case presents no substantial question warranting plenary consideration by the Court.

The power of the Congress to regulate interstate commerce and its instrumentalities is too well settled to need more than mention. Paragraphs (18), (19) and (20) of §1 of the Interstate Commerce Act, under the authority of which the certificate issued in this case, were enacted as part of the Transportation Act of 1920. That Act was enacted by the Congress following World War I in order

to bring to a close the wartime period of federal operation of the railroads and to vest in the Interstate Commerce Commission the statutory power and duty to foster and develop the national system of transportation by railroad by placing in the hands of the Commission, *inter alia*, the jurisdiction to control the extension and abandonment of the lines of interstate carriers. The decisions of this Court in the *Colorado, Transit Commission* and *Yonkers* cases, all of which have been rigidly adhered to by the Commission in this case, mark out the nature of the function of the Commission with respect to the issuance of certificates authorized by the Act. Earlier — and independent of any statutory enactments — this Court in the cases of *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 399 and *Railroad Commission* v. *Eastern Texas Railroad Co.*, 264 U.S. 79, 85, had decided that a railroad could not, under the Fourteenth Amendment, be compelled by a State to continue the operation of its railroad at a loss; that when it develops with reasonable certainty that future operation of the railroad must be at a loss "the company may discontinue operation and get what it can out of the property by dismantling the road" (264 U.S. 79, 85).

The Appellee was and is an interstate commercial railroad and not a street, suburban, or interurban electric railway, exempted from the abandonment provisions of the Act. The specific finding of the Commission, both in 1955 (when it authorized Appellee to abandon a branch route located within the State of Illinois) and in this case, to the effect that the Appellee is such commercial railroad subject to the Interstate Commerce Act and to the jurisdiction of the Commission in the matter of abandonment, is fully and amply supported by the evidence. It is also consistent with the Commission's previous decisions with respect to the Appellee going back more than 35 years and pertaining to a variety of matters, such as (1) inspection of equipment,

(2) employees' railroad retirement benefits, (3) employee-employer relationship under the Railway Labor Act, and (4) unemployment insurance.

In 1927, in connection with deciding whether equipment used by the Appellee subjected Appellee to the jurisdiction and inspection requirements of the Interstate Commerce Commission, the Commission examined into the facts and decided that the railroad was subject to its jurisdiction and was not a street, suburban or interurban electric railway. *Rules For Testing Other Than Steam Locomotives,* 122 ICC 414, 438-439.

In 1937, the Commission was required to decide whether the Appellee was a railroad subject to the Railway Labor Act, the Railroad Retirement Act of 1937, and to the National Railroad Unemployment Insurance Act. After extensive hearings the Commission again decided (July 1939) that the Appellee was a commercial interstate railroad and not a street, suburban or interurban electric railway. (*Chicago North Shore and Milwaukee Railroad Co., Railway Labor Docket,* 234 ICC 13). Relying on the decision of this Court in *United States* v. *Chicago North Shore and Milwaukee Railroad Co.,* 288 U.S. 1, (and now relied on by Appellants), the railroad appealed from the findings of the Commission. The Commission's decision was affirmed by the Seventh Circuit Court of Appeals, *Sprague, Receiver* v. *Woll,* 122 F. 2d 128. This Court denied certiorari (314 U.S. 669). Since such decision, therefore, the employees of the railroad have been protected by the provisions of the Railroad Retirement Act, the Railway Labor Act and the Railroad Unemployment Insurance Act and, on the abandonment of the railroad, are now entitled to unemployment compensation benefits under said Railroad Unemployment Insurance Act and to retirement benefits under said Railroad Retirement Act. The employee organizations representing the employees who had participated in the hearings before the

Interstate Commerce Commission did not join in the court proceedings leading to this appeal. Neither did the Public Service Commission of Wisconsin. Nor did they question the jurisdiction of the Interstate Commerce Commission to hear and determine the application for abandonment.

In 1954, in an endeavor to reduce its operating losses, Appellee applied to the Interstate Commerce Commission for permission to abandon operations of a branch route located entirely within the State of Illinois and known as the "Shore Line Route." Protests were filed by employees and by cities and villages on the line sought to be abandoned. Jurisdiction of the Interstate Commerce Commission to hear and determine that application was challenged by some of the parties but not by the labor organizations, on the ground that the railroad was a street, suburban or interurban electric railway. Again the Interstate Commerce Commission, acting in compliance with the directions of this Court as contained in the opinion in the case of *City of Yonkers* v. *United States*, 320 U.S. 685, reexamined and reconsidered all of the physical characteristics appertaining to Appellee's railroad and decided that the Appellee was a commercial railroad and was not an interurban exempted from the abandonment provisions of the Interstate Commerce Act. Appellant, Illinois Commerce Commission did not at that time protest such finding. (See: *Chicago North Shore and Milwaukee Railway Abandonment*, 290 ICC 765).

The respective findings of the Commission are amply supported by the evidence. We have previously referred to the fact that Appellee operated trains in interstate commerce across the State lines of Wisconsin and Illinois. Such an operation across State lines is not essentially different than the similar operations of the New York Central, Pennsylvania Railroad, and Santa Fe, whose interstate character would be readily conceded. Appellants refer to two "distinct

passenger services" (J.S. p. 9). This was not the case. Practically every inch of Appellee's line of railroad was used in interstate commerce and in the transportation of interstate freight or interstate passengers. Some trains operated by Appellee did not cross the state line and served only stations in Illinois. However, the operation of these trains was intermingled with the operation of the interstate trains. The two services were inextricably intertwined. All trains used the interstate facilities of the railroad. There were no separate books of account. Appellee did not have, as the jurisdictional statement seems to imply, a separate plant for intrastate service. Appellee's evidence showing that a wholly intrastate operation in Illinois could only result in staggering losses was uncontradicted by any evidence.

There are many other items of evidence entering into and supporting the findings of the Commission. Appellee's line of railroad, located largely on private right-of-way, is double-tracked, of standard railroad gauge and constructed subject to standard Class I railroad clearance requirements. The principal route, the Skokie Valley Route, is laid with 100 pound rail and some 115 pound rail on crushed stone ballast suitable for and used for the operation of standard railroad freight cars. For carrying the electric power cables there was a so-called overhead catenary distribution system on expanded steel towers located at about 250 foot centers. Appellee operated a modern block signal system automatically controlled except for one short segment. About 85% of the grade crossings were protected by track circuit controlled standard automatic crossing protection devices used on railroads generally. Appellee's rail system was physically connected at six different locations with the rails of four other so-called steam or Class I railroads for the interchange of freight cars moving in interstate commerce. Appellee owns electric locomotives. By coupling such loco-

motives as many as 50-60 freight cars can be hauled in one train. Appellee operated high-speed interstate passenger trains called "Electroliners" daily between Milwaukee and Chicago terminals. At stations on its line Appellee sold "through" railroad and Pullman tickets to any place in the United States, Canada and Mexico. Appellee participated in more than 1000 tariffs with other interstate railroads, including all Class I trunk line railroads. It was a member of the Western Passenger Association, the Illinois Freight Association and the Western Trunk Line Association. All of the facts and circumstances taken together amply support the findings of the Commission that the Appellee was a commercial railroad subject to Part I of the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission and was not exempted from the abandonment provisions of the Act as contended for by Appellants.

Appellants emphasize the 1933 decision of this Court in the case of *United States* v. *Chicago North Shore and Milwaukee Railroad Co.*, 288 U.S. 1 — a case which did not involve abandonment. The decision in that case affirmed the dismissal of a complaint that had been filed by the United States seeking, in effect, to void approximately $38,000,000 of bonds of a corporate predecessor which were then outstanding in the hands of the public because the issuance thereof had not been specifically approved by the Interstate Commerce Commission prior to issuance. The decision of this Court was there based largely, if not wholly, on equitable principles. The issuance of the outstanding securities while not specifically approved by the Commission, had been made known to the Commission in annual reports to the Commission for many years; in addition there had been some earlier misunderstanding with respect to the necessity for such approval. This Court held in effect that even though the question as to the proper classifica-

tion of the railroad was not free from difficulty, that under the circumstances then prevailing in that case, the United States was equitably estopped to insist on a classification which would have voided a large amount of outstanding bonds. See decisions in *Sprague, Receiver* v. *Woll*, 122 F. 2d 128, 131; *Texas Electric Ry. Co.* v. *Eastus*, 25 F. Supp. 825, 832-833. Subsequent to that 1933 decision, the Appellee railroad placed its Electroliner trains in operation in 1942. The decision in the Railroad Retirement, Railroad Unemployment Insurance and Railway Labor Act case was rendered by the Interstate Commerce Commission in 1939 and upheld by the courts, including this Court, in 1941. The decision in the securities case therefore has been held by the courts to be not conclusive as to regulatory matters arising before the Commission subsequent thereto.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 20945

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided May 4, 1960

Action deferred for trial period of 1 year to afford the Chicago North Shore and Milwaukee Railway, in cooperation with regulatory commissions, State and local authorities, and the public, an opportunity to explore all possibilities for profitable operation, including an immediate request by the carrier for necessary fare increase.

James J. Magner, Charles D. Mahaffie, and *Frederick E. Stout* for applicant.

Harry R. Begley and *Ellis A. Ballard* for the Illinois Commerce Commission, protestant.

William E. Torkelson, A. Wilford Larson, John W. Reynolds, and *Beatrice Lampert* for the State and Public Service Commission of Wisconsin, protestants.

William G. Mahoney, Richard R. Lyman, Joseph A. Robie, P. G. Ward, Clyde M. Betts, G. P. Sheahan, Clint Bush, John F. McClain, Clyde Thompson, B. N. Kinkead, R. C. Williamson, W. E. McDenough, Maynard C. Groat, Thomas Duggan and *Justus R. Moll* for railway labor organizations, protestants.

S. Ashley Guthrie, Francis D. Fisher, Charles K. Bobinette, Robert N. Burchmore, Robert McClory, Thaddeus S. Snell, G. P. Sletteland, John E. Baker, Jr., John C. Melaniphy, Edward J. Kelly, Gerald E. Franzen, Walter J. Mattison, Harry G. Slater, Thomas D. Ahern, Thomas P. Corbett, Fred W. Wheeler, Bryon Matthews, Willis A. Overholtzer, Captain H. S. Harris, U.S.N., B. L. Polak, Robert J. Downing, Murray R. Counselman, Robert Sabonjian, William A. Angus, Thomas H. Compere, Mrs. Martha J. Haskell, Robert V. Baker, K. Thomas Savage, John B. Moser, and *Elroy C. Sandquist* for other protestants.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

The Chicago North Shore and Milwaukee Railway, hereinafter sometimes referred to as the applicant or the North Shore, is an electric railroad subject to the provisions of part I of the Interstate Commerce Act. On June 25, 1958, the North Shore applied under section 1(18)-(20) of the act for a certificate of public convenience

and necessity permitting abandonment, or abandonment of operations, of its entire line of railroad extending generally between Milwaukee, Wis., and Chicago, Ill.; between Lake Bluff and Mundelein, Ill.; and between North Chicago Junction and Elm Place, Highland Park, Ill.; a total distance of approximately 106.05 miles, in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Except for a short segment in Milwaukee where the applicant operates over a line of its wholly owned subsidiary, and between Howard Street and Roosevelt Road, Chicago, approximately 12.04 miles, where the applicant operates under trackage rights over the elevated line of the Chicago Transit Authority, all the mileage sought to be abandoned is on North Shore owned right-of-way.

Similar applications with respect to the abandonment of intrastate operations by the applicant were filed with the State commissions of Wisconsin and Illinois. Numerous protests were filed against the North Shore's proposals by and on behalf of the cities and villages served by the applicant, commuter associations, industries, railway employees' organizations, and individual users of the applicant's service. Upon request, the application filed with the Illinois Commerce Commission and the one filed with us were the subject of a joint hearing. On November 24, 1959, the Illinois Commerce Commission denied the application filed with that authority.

An examiner's proposed report was served in this proceeding in which it was recommended that we overrule protestants' pending motions to dismiss the application for want of jurisdiction, and that a certificate of public convenience and necessity be issued permitting abandonment and abandonment of operations, as to interstate and foreign commerce, by the North Shore of its entire railroad service. Exceptions to the proposed report were filed by the protestants, and the applicant replied. Oral argument was heard. Unless otherwise indicated, all points hereinafter mentioned are in Illinois.

The applicant's predecessor railroad company, on November 1, 1946, emerged from reorganization under chapter X of the Bankruptcy Act. Thereafter it purchased certain buslines and bus and rail equipment. In 1953 there was a voluntary reorganization with the approval of the Illinois Commerce Commission under which certain properties including the bus companies, real estate, certain cash, and government securities having a total net value of $4,973,462 were transferred to a new parent or holding company, the Chicago, North Shore System, Inc., the name of which in 1956 was changed to the Susquehanna Corporation. The remainder of the operating assets consisting largely of the railroad properties and most of the line's liabilities were transferred to a new company, the Chicago

North Shore and Milwaukee Railway, the present applicant. The stock of the railroad also was transferred to the holding company. Thereafter the holding company made a loan of $500,000 to the applicant, of which $200,000 remains unpaid. The stated purpose of the reorganization was, in part, to place existing funds in a company not subject to regulation as a public utility in order that investments might be made more freely. Since then the parent company has made purchases of various oil and uranium properties.

At the outset, we must determine the question of law interposed by two separate motions filed by protestants challenging our jurisdiction herein. The applicant contends that we have jurisdiction. The motions are identical in that each alleges the North Shore to be an electric suburban and interurban railway not operated as a part of a general railroad system of transportation, and therefore exempt from our jurisdiction pursuant to the provisions of paragraph 22 of section 1 of the act. The same contention was presented by protestants in *Chicago N. S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the applicant was permitted to abandon its so-called shore line route in Lake and Cook Counties. The cited case contains a complete and comprehensive discussion of the law applicable to the jurisdictional question, including the cases relied upon by protestants in support of their contention, which will not be restated here. We are convinced that a railroad, such as the North Shore, operating between Chicago and Milwaukee, is not a street suburban or interurban electric railway within the meaning of section 1(22).

The North Shore handles about 8,000 round-trip passengers a day, most of whom are commuters going to and from their work in Chicago and its suburbs or in Milwaukee, Kenosha, Racine and Oak Creek, Wis. During 1958 a total of 5,151,695 passengers were handled reflecting an increase since 1949 of about 20 percent. In view of such heavy commuter movement and their need of and preference for the carrier's service as shown by the record, the operation of the North Shore should be continued if at all possible. The patrons are willing to pay a premium fare for the convenience of using the North Shore service to and from the stations located in the Loop of downtown Chicago. In 1958, the North Shore commuters paid in excess of a half million dollars for that privilege rather than using the service of the competing Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, both of which terminate at separate stub-end terminals west of the Chicago River some distance from the Loop.

We are cognizant of the continuing financial operating deficits sustained by the applicant in recent years. Its average annual loss for the 4 years 1955–58 has been about $340,000. In 1958, such loss

amounted to $246,160, and for the last 6 months of that year its system operations resulted in a modest profit of about $3,900. The operating losses sustained by the applicant in 1952 amounted to $672,772, in 1953 to $488,010, and in 1954 to $364,253. It seems clear, therefore, that the applicant's losses from system operations have decreased somewhat since the abandonment of its so-called Shore Line in 1955. Excluding depreciation, the applicant had a cash income in 1958 of $78,840.

Traditionally in the past, the fares of the North Shore have been higher than those of the North Western and the Milwaukee to and from comparable competing stations. The last fare increase on the North Shore was in 1957. Since then the commuter fares on the Milwaukee have been increased some 43 percent, and those on the North Western about 29 percent which, in effect, eliminated or substantially reduced the higher fare differential favoring the North Shore. At the hearings herein, the users of the North Shore testified that they would not object to a reasonable fare increase; and more recently regulatory authorities have shown a general tendency of permitting commutation fares of common carriers to be raised sufficiently to pay the full cost of providing such service. Protestants have filed a complaint with us requesting that the fares of the applicant be increased pending determination of the abandonment application. We are of the opinion that before abandonment by the North Shore is to be permitted, a request for a substantial fare increase should be made immediately by the applicant, and operations should be continued for a reasonable period thereafter in order to determine what effect such increase would have on its financial status.

Along this same line, and in furtherance of possible continued operations without loss, the North Shore should endeavor to effectuate more stringent operating economies in amounts greater than those which already have been accomplished. We deem it unnecessary to detail specifically how this might be done, but would suggest that every phase of the operation be scrutinized carefully, including such items as equipment repairs, deferred maintenance, employee relationships, power costs, trackage right rentals, mechanized machinery for right-of-way work, local and State taxation, and assessments for public improvements which might result in savings to the applicant. We feel that these matters are within the managerial discretion of the applicant, and should be pursued with due diligence and dispatch. In other words, it is required of the applicant that it seek all possible means of increasing revenues and reducing operating expenses, before we issue a certificate permitting abandonment of its

operations. The present record shows, and we find, that the applicant has failed to exhaust all existing possibilities in this regard.

With respect to operating expenses chargeable against the operation, it may be well for the applicant to reexamine the depreciation charges, particularly as to rolling stock, currently in effect. According to the record, no adjustment has been made in the depreciation rates for several years, and in view of the added age of the passenger-car equipment now in service, a reduction in the amount of depreciation charged in performing operations might well be justified.

We wish to point out, however, that future operations are not the responsibility of the applicant alone. The State of Illinois, the communities served, especially the termini, the passengers using the service, and applicant's employees should cooperate in attaining that goal. Discretion must be exercised to avoid dissipation of the additional revenues which may result from a fare increase. State and local authorities should avoid, if possible, assessment against the applicant of large sums of money as its share of the cost of public improvements, which under present circumstances it can ill afford, if operation is to continue. Applicant estimates that proposed public improvements in connection with highway construction at Milwaukee will cost it in excess of $1 million, but the protestants contend that such estimated amount is highly speculative and greatly exaggerated. They state that the highway improvements probably will be made at Federal expense, with only minor expenditures assessed against the North Shore. It is doubtful that the present precarious financial condition of the applicant can support any substantial increased expenditures resulting from public improvements.

Protestants contend that failure of the applicant to seek a fare increase indicates that it is not interested in conducting a profitable operation and thereby affording the public the commuter transportation service which it so desperately needs. In support of this theory, they point to the survey conducted by a firm of financial analysts in 1954, the author of such report being president of the applicant when the instant application was filed. The report recommended that the parent company, Susquehanna Corporation, endeavor to dispose of all of its railroad assets and operations, whether or not the railroad operations could be conducted at a profit, and make use of a tax shelter of approximately $20,000,000 which would be created thereby. It was estimated that this would produce savings in Federal taxes of $10,000,000. Protestants point out that the application in this case is being processed precisely in accordance with the time schedule contained in the foregoing report, in that the abandonment of the entire line was not to be undertaken until the

tax shelter created by the previous abandonment of the Shore line route had been absorbed and the parent company was in a position to take advantage of the new and larger tax shelter that would stem from the disposition of the remaining railroad assets. Obviously the abandonment application should not be denied for the reason that substantial tax savings probably would result to the Susquehanna Corporation. On the other hand, where a carrier is relied upon by approximately 8,000 persons to provide daily transportation service to and from their place of employment, we are of the opinion that a substantial public need is indicated. Under such circumstances we must be certain that everything possible has been done to operate the line profitably and that its proposed abandonment is not, as alleged, merely a convenient method of securing tax reductions for the parent company which would benefit thereby to a far greater extent than it could hope to benefit from continuing service to the public at a relatively small profit. The last-mentioned factor may not be considered as indicating justification for abandonment of a line of railroad on which the public relies for transportation. In *Atchison, T. & S. F. Ry. Co. Abandonment*, 254 I.C.C. 767(778), with reference to tax savings of a similar nature, we said:

> However, we do not believe that such matters have any reasonable relation to the issues of public convenience and necessity which we must decide. No stigma attaches because a railroad uses all lawful means to lighten its tax burden, but the fact that an applicant's savings in taxes by an abandonment probably will be greater than any profit in the future from the continued operation of the line, is not a fact which we will consider in determining the public need therefor.

In view of the considerations mentioned herein, we conclude that action on the application should be deferred for a period of 1 year to enable a determination of possible continued operation by the North Shore without loss. During this time, applicant, in addition to consideration of the possible economies noted herein, should, in cooperation with regulatory bodies, its employees, State and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

An appropriate order will be entered.

COMMISSIONER GOFF did not participate.

U.S. GOVERNMENT PRINTING OFFICE: 1960

F-9186

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 20245 [1]

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided May 16, 1962

1. Certificate and order issued in Finance Docket No. 20245 permitting abandonment by Chicago, North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill. Prior report, 312 I.C.C. 99.
2. In No. 33337, complaint dismissed.

Appearances as in prior report and, in addition, *L. Agnew Myers, Jr.*, for applicant; *William G. Clark* and *Edward V. Hanrahan* for the Illinois Commerce Commission, protestant; *William B. Peer*, *Donald J. Curtin*, and *Frank Benner* for railway labor organizations, protestants; *George E. Rice* for a protestant; and *Jordan Jay Hillman* for an interested party.

REPORT OF THE COMMISSION AFTER FURTHER HEARING

TUGGLE, *Commissioner:*

By our prior report [2] of May 4, 1960, 312 I.C.C. 99, we assumed jurisdiction under section 1 (18)-(20) of the act to consider the issues of public convenience and necessity presented by the application for abandonment, and concluded that action thereon should be deferred for a period of 1 year in order to obtain more conclusive facts bearing on the ultimate issue. We took this action despite the continuing deficits sustained by applicant in recent years because we noted a lessening of the deficit trend in 1958, the latest period for which financial results of operations were shown in the prior report, and considered it might be eliminated by higher fares and reduced expenditures. Our conclusions as to what should be done by the parties during the 1-year interim period were summarized as follows at page 104 of our prior report:

During this time, applicant, in addition to consideration of the possible economies noted herein, should, in cooperation with regulatory bodies, its employees, State

[1] This report also embraces No. 33337, The North Shore Commuters' Association, Inc. v. Chicago North Shore & Milwaukee Railway, which was reopened for further hearing with the title case. No testimony directed to the issues in No. 33337 was offered at the further hearing, and extended discussion of that proceeding in this report is not necessary.

[2] In response to a petition of applicant filed June 6, 1960, by our order of July 6, 1961, we made certain corrections at pages 101 and 102 of the interim report as printed in loose leaf form. These corrections do not require repetition here. By the same order, a petition for reconsideration filed June 9, 1960, by the Illinois Commerce Commission on the question of jurisdiction was denied.

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and local authorities, and the public, endeavor to further explore the possibility of reducing operating expenses. Any fare increase that may be granted must be accepted and applied pending our final determination herein.

Thereafter, applicant filed the following documents: On February 15, 1961, a petition for vacation of our order of May 4, 1960, and the granting of authority for immediate abandonment of the railroad; on April 7, 1961, a petition for "expedited procedure" in the case; and on April 17, 1961, a motion for leave to file additional evidence in the form of the then current income accounts of applicant. In May and June 1961, certain protestants filed petitions and motions which need not be described now, and numerous replies to these several pleadings were filed by the parties. After consideration, all these petitions and motions were denied by our order of July 6, 1961, except that (1) the proceeding was reopened for further hearing to include all the issues presented by said pleadings, and (2) the corrections in the prior report as mentioned in footnote 2 were made. That order also made a finding that circumstances require the omission of a hearing examiner's recommended report on further hearing.

Further hearing has been held, briefs and reply briefs were filed, and we have again heard the parties in oral argument. The description of the rail properties of applicant which it proposes to abandon, of the prior proceedings before us in this case, and of the corporate history of applicant, are set out in the prior report and will not be restated.

Contrary to the decline in 1958 of applicant's deficits, financial data for subsequent periods show, for the most part, substantially larger deficits as reflected in the following data:[3]

Year	Operating deficit	Corporate deficit
1955	$991,874	$364,233
1956	515,057	344,295
1957	622,413	414,914
1958	462,615	346,189
1959	398,885	309,143
1960	428,289	299,720
Ended May 31, 1961	539,572	427,621

The latest data available at the time of our prior report were for 1958, and we there commented that for the last 6 months of 1958 applicant realized a profit of $3,900, that applicant's losses had decreased somewhat since the abandonment of its so-called Shore Line in 1955, and that, excluding depreciation, applicant had a cash income in 1958 of $78,840.

[3] We agree with the contention of protestants that, in considering these deficit figures as a measure of future possibilities, the amount of $38,232, representing a retroactive adjustment of wages for an earlier period, should be deducted in determining the results for the year ended May 31, 1961.

Financial results of applicant's operations worsened immediately. Except for a reduction of the operating deficit in 1959, the losses of applicant have mounted steadily. Cash losses of applicant, excluding depreciation, were $15,507, $91,767, and $179,011 in 1959, 1960, and for the year ended May 31, 1961, respectively.

The deficit figures shown do not take into consideration applicant's failure to keep up "normal maintenance" of its ways and structures in recent years. "Normal maintenance" includes necessary painting, and replacement of rail, ballast, ties, trolley wire, and poles, and annual cost thereof has been estimated at $394,000. This figure is not seriously disputed and its inclusion in applicant's costs would result in operating deficits of $723,000, $792,000, and $864,000, and corporate deficits of $624,000, $693,000, and $762,000, respectively, for 1959, 1960, and the year ended May 31, 1961.

Applicant's continuing and increasing deficits occurred despite an average increase in interstate and intrastate passenger fares of 23 percent, which became effective in June 1960,[4] a result which was in sharp conflict with protestants' predictions. The Illinois Commerce Commission had estimated that the fare increase would increase revenues by $500,000 a year but additional revenue for the year ended May 31, 1961, was $118,493, some 76 percent less than its estimate.

Offsetting the fare increase were two factors, a wage increase of 21.5 cents an hour for applicant's operating and nonoperating employees, effective June 1, 1960, increasing applicant's cost for the first full year it was in effect by $266,909, and the opening on November 5, 1960, of a 6-lane freeway extending from a point near the Loop in Chicago to the Edens Expressway. As is apparent, the increased labor costs exceeded the increased revenues by $148,416. Notwithstanding this wage increase, however, the wage scales of all of applicant's contract employees are below the national average for employees performing the same duties for other railroads.

The number of passengers carried by applicant has generally decreased since January 1959, when 451,805 passengers were carried. In December 1960, the first full month after opening of the freeway, the number of passengers carried by applicant decreased by 46,029 from the corresponding month in 1959. In January 1961, the number of passengers carried was less than 400,000 for the first time in 2 years, and in July 1961, the number had further declined to 350,863. Attached hereto as appendix I is a table showing the number of passengers carried each month by applicant for the year 1959 through July 1961, and the increase or decrease in passengers carried in 1960

[4] The published interstate fares satisfied the complaint in No. 32337 which was dismissed by order of July 1, 1960. However, by our order of July 6, 1961, we reopened the proceeding and assigned it for further hearing on a consolidated record with the proceeding in Finance Docket No. 20245.

and the first 7 months of 1961 in comparison with corresponding months in 1959 and 1960.

An on-and-off count of all passengers carried during the week of November 10–16, 1960, showed that between all points served, Monday through Friday, a daily average of 7,742 passengers rode southbound and 7,014 traveled north. November 11 was a holiday, on which travel was somewhat heavier than on other weekdays. As shown above, passenger traffic has declined in 1961. Our conclusion in the prior report that the North Shore handles about 8,000 round trip passengers a day is modified conformably.

Applicant's passenger cars are antiquated. Of its 135 passenger cars, some 127 are over 30 years old and have a seating capacity of approximately 56 passengers a car, whereas the passenger cars purchased by the Chicago and North Western Railway for commutation service in 1959 and later have a seating capacity for either 155 or 161 persons. A line of the Chicago and North Western Railway parallels applicant's line on the east, and a line of the Chicago, Milwaukee St. Paul and Pacific Railroad is parallel to that of applicant on the west, between Milwaukee, Wis., and Chicago. In appendix II the location of stations on these two railroads with reference to applicant's stations is set out, with distances shown between the stations.

After a detailed study of applicant's operations, engineers of the Chicago Transit Authority made a report dated February 17, 1959, on the probable results of operation by that authority of applicant's entire line, in passenger service only, under conditions prevailing during the year ended September 30, 1958. This study was made on the assumption that some agency would acquire the properties of applicant, would pay all real estate taxes and the cost of all maintenance of way and structures thereon, and that the authority would continue the passenger operations in their entirety. It was estimated that the authority would sustain an operating loss of $500,000 for that year of operation under those conditions. For comparative purposes, however, a deduction of $33,000 should be made from that estimated deficit, to represent the difference between the reserve required by law to be maintained by the authority to meet claims for damages, and the actual damage claims paid by applicant during the year 1957.

Protestants have endeavored throughout the proceeding to show that changes can be made in applicant's operations sufficient to offset its deficits and return a profit. Proposals directed toward that end were submitted at the hearing by three witnesses, Robertson, a transportation analyst employed by the Illinois Commerce Commission, and Martin and Weston, a certified public accountant and a well qualified consulting engineer, respectively, who were employed by protestant North Shore Commuters' Association, Inc.

Weston adopted plans submitted by Robertson for discontinuance, in whole or in part, of operation of a number of trains, as later mentioned. Other savings recommended by Robertson included: (1) elimination of a chartered bus used in making three round trips daily with employees of applicant between Briergate, Lake Bluff, and Highwood, Ill., at an annual cost of $11,358; (2) elimination of three operators of a manual block system working from a tower at Kenosha, Wis., $18,308 per year; and (3) elimination of overtime hours worked by applicant's employees to the extent that such overtime exceeded the overtime hours worked by employees of the Chicago, South Shore & South Bend Railway for the same period, which would have saved $62,262 in the year 1960. Total savings so computed, after deduction of $5,498 for loss of revenue from certain trains eliminated, were $85,430 per year.

Martin estimated that savings of $24,962 per year in salaries of employees would result from elimination of daily verifications of envelopes turned in by conductors, "simplification of interline accounting," and discontinuance of verification of invoices less than $35 in amount.

Weston estimated that savings of $400,778 could be accomplished by his following proposals: (1) rescheduling of applicant's trains and changes in their consist; (2) discontinuance in whole or in part of the operation of a number of trains;[8] and (3) substantial curtailment of the present number of inspections of equipment, complete overhauls of equipment, and cleaning of cars. Under this plan, regular inspection of conventional passenger cars in the shops of applicant would be made once every 3,400 miles of operation, or about once a month, and major overhauls, which include heavy repairs of such cars, would be made after each 360,000 miles of operation, or about once every 10 years.

Protestant North Shore Commuters' Association, Inc., indicated that it would not oppose a fare increase to yield $125,000 per year if the railroad is not abandoned; and its president would recommend a further fare increase to offset the difference between the reduction in charges proposed by the Chicago Transit Authority to applicant and the sum of $125,000; and that such increase in fares could be "in the area of 5 percent." A 5-percent increase in the total of $4,686,337 of passenger revenue of applicant for the year ended May 31, 1961, would be $234,317 per year.

Applicant has assumed obligation to operate the chartered bus in a number of agreements with labor organizations, because it replaces the transportation of employees formerly traveling over the aban-

[8] The entire "300 series" of five trains in each direction on the Lake Bluff-Mundelein Division on weekdays, and trains 1, 6, 19, 413, 419, 424, and 431.

doned Shore Line. The bus handles three different groups of employees, with different starting and quitting times, and could not be discontinued without agreement thereto by the employees affected. Elimination of the towermen at Kenosha would require our prior approval, and has not been shown to be conducive to safe operations.

The verification of conductors' envelopes was abandoned by applicant in 1958 as an economy measure. Witness Martin's "interline accounting" relates to "passing reports" as to the location of freight cars while on applicant's line, which are made on a part-time basis by various employees performing other work. One comptometer operator checks all invoices, in small or large amounts, and performs other duties as well. Opportunity for effecting economies in these areas of operations appears to be almost nonexistent.

Witness Gannett, an engineer with extensive experience in the operations of and equipment maintenance on eastern railroads, who was retained by applicant, considered witness Weston's plans generally to be impracticable, and opposed particularly any relaxation of the present system of inspection and overhauling of applicant's old passenger cars as unsafe practice. Both Smith, a consulting engineer who headed a group employed by applicant, and Gannett, stated that in all their experience with railroad car maintenance, and the accounting for its costs, the costs of materials used have always constituted at least 50 percent of the cost of labor performed. In computing his maintenance costs under a new schedule of operation, witness Weston estimated material costs for maintenance at $81,901 per year, which is only 20 percent of the estimated labor cost. Applicant's actual cost of material for maintenance for the year ended July 31, 1961, was about $234,900, which was 42 percent of the labor cost. Accepting 40 percent of the labor cost as valid for determining the material costs for maintenance, Weston's estimated cost of $81,901 for materials should be increased to $163,802 and his estimated savings reduced by one-half of this increase or $81,901.

A change in applicant's practice made in October 1960, in accounting for revenues from tickets sold for future use, is in accord with our accounting rules, and the resulting credit of $19,840 in revenue to the month in which the tickets were used, rather than when they were sold, did not result in an understatement of total passenger revenues.

Computations submitted by the commuter's association to show that applicant could continue operations at a profit through effecting certain savings are reflected in appendix III. That appendix reproduces their computations, with certain corrections * from the record,

* The principal correction, in accord with the testimony at page 643 of the transcript on further hearing, is the change in the amount of savings from "Revised Operating Plan" from $407,276 to $400,778.

and also contains a restatement of the computations with adjustments as follows: deduction of $81,901 from item (1) Revised Operating Plan, to reflect increase of witness Weston's material costs in maintenance work to the basis of 40 percent of his estimated labor costs; elimination of items (3), (4), and (5) relating to the chartered bus, the Kenosha tower post, and accounting department employees; and elimination of item (9), "passenger revenue excluded" as an improper deduction. The elimination of only those stated items where it is apparent that savings cannot be effected, shows that applicant would still have operated at a loss even without including as a cost item any amount for "normal maintenance."

The computations of protestant Illinois Commerce Commission on brief are set out in appendix IV. They take into consideration as a loss item "normal maintenance" of $324,000, but differ from the computations just discussed in that they include under the title "4-point Program," savings proposed of $375,000 per year, computed as follows:

(1) Reductions in charges of Chicago Transit Authority	$11,162
(2) Savings from acceptance of voluntary wage cuts by employees	125,000
(3) Revenue from increased fares, about	238,000

The estimated savings in item (1) must be reduced to $5,581, as the Chicago Transit Authority would agree to only a 3-percent reduction in its present charges for use of its tracks and this only for a temporary period. The savings in item (2) from voluntary wage cuts should be eliminated entirely since the railroad labor organizations would make no commitment as to the "length or term" of acceptance of such a wage cut; also acceptance thereof was conditioned upon our issuance of an order denying the abandonment here proposed, and further conditioned upon the reduction of mileage charges of the Chicago Transit Authority in the amount of $125,000 per year, or a fare increase to offset any reduction below the sum mentioned. The estimated increase in revenues from higher fares in item (3) should be reduced to $58,579, which is one-fourth of the mathematical increase, a figure in line with the latest increase in passenger fares. The total for the 4-Point Program so adjusted is $64,160.

Elimination from "Robertson's savings" of the chartered bus item and that for the Kenosha towermen, items which are duplicated in "Weston's savings," would reduce savings proposed by the former to $55,764; and, for reasons stated in connection with the previous computation, "Weston's savings" are reduced to $318,877, and "Martin's

savings" (item 5 in appendix III) are eliminated. Effectuation of these adjustments in the computations of the Illinois Commerce Commission would show a substantial loss for applicant based upon the use of financial data available for the year ended May 31, 1961.

We do not agree with protestants' view that the predominant cause for the reduced traffic of applicant, and the consequent losses, was a severe nationwide recession of 1960–61. Although there was a "recession" during a portion of those years, employment figures and permits for new homes showed improvement in the area herein involved in 1961. The employment picture showed improvement in May through July and permits issued for new homes in 16 towns in Illinois served by applicant increased by 16 percent over the number issued during the same period in 1960. However, passengers transported by applicant for the first 6 months in 1961 averaged about 60,000 less a month than was carried for corresponding months in 1960.

We realize that the making of ancillary findings is an empirical rather than a scientific process and that we cannot determine exactly the past impact of the opening of a modern highway or a business recession upon the financial status of applicant any more readily than we can determine precisely the future effect of a further increase in fares. We have considered it proper to go into considerable detail in such matters, however, in recognition of the strenuous efforts of protestants to find means to preserve the applicant's line as a convenient public transportation facility.

We cannot find on this record that the present management of applicant has failed to exert its best efforts to continue operations without loss, despite the fact that the parent company will benefit financially if the railroad is abandoned. To the contrary, we believe that those operating applicant's line are entitled to full credit for maintaining a safe operation, without serious criticism from the public of the service rendered, on a railroad which for years has had a minimum of maintenance work performed, and which has only antiquated equipment available for use. In this connection, it is noted that for the year ended May 31, 1961, applicant reduced its operating expenses, exclusive of wages paid, by $221,077 below those for the previous year.

The failure of applicant to increase fares until required to do so by the action of the commuters' association and our findings in the prior report cannot be criticized, as the prediction of its representatives that such action would not result in a net gain now has been realized. As to the wage increase of June 1960, no suggestion as to what might have been done differently has been or now is offered;

and the argument of applicant's counsel that to the extent that its employees have worked at wages which were and are below the national average for such work amounted to a "subsidy" to the railroad and its patrons has merit. It is true that applicant might have discontinued certain unprofitable trains entirely, and curtailed service on others, but the record is clear that the savings thus accomplished would make no effective contribution to the overall financial problems of the applicant.

It is significant that the economies recommended by protestants are either in the area of providing less service to those using the facilities of applicant, or in cutting expenditures which contribute directly to safety of operation. Even so, protestant's computations directed toward future operation by applicant without loss either ignore the cost of maintenance which cannot be postponed indefinitely, or assume contributions from higher passenger fares and acceptance of lower wages by employees which reasonably cannot be expected to materialize. Giving weight to these considerations, the computations indicate a continued net loss by applicant of $300,000 per year or more, even if savings recommended by protestants which have not been discussed at length herein, amounting to about $300,000 per year, could be accomplished. In prior cases carriers have not been required to continue the business of carriage where their overall operations were conducted at a systemwide deficit for a substantial period of time and there was no reasonable prospect of conducting those operations at a profit in the foreseeable future. *Jay Street Connecting R. Abandonment of Entire Line*, 307 I.C.C. 137; *Nezperce & I. R. Co. Abandonment*, 257 I.C.C. 81. Accord *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U.S. 396, 399 (1920).

As we said in the prior report, the fact that the parent Susquehanna Corporation will realize substantial tax savings in the event of abandonment has no bearing upon our determination whether public convenience and necessity permit abandonment, except that it might lead to a more thorough inquiry as to the facts. There is no evidence of record showing any financial dealings or other arrangements between applicant and its parent company which might have improperly affected applicant's case in support of the proposal to abandon all operations.

For reasons set out in prior cases in which all operations of a railroad have been authorized to be abandoned, no conditions for the protection of employees will be imposed to this proceeding. *Susquehanna & N. Y. R. Co. Abandonment*, 252 I.C.C. 81, 88; and *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171, 187.

CONCLUSION

We conclude and find that the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation; that abandonment of all operations is warranted, subject to the condition that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm, or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; that the imposition of conditions for the protection of employees adversely affected by the abandonment is not justified in the circumstances of this case; and that the inconvenience to users of applicant's service which will result from the abandonment will be mitigated by the availability of rail service provided by the Chicago & North Western Railway and the Chicago, Milwaukee, St. Paul and Pacific Railroad.

Subject to the condition stated, we find that the present and future public convenience and necessity permit abandonment by the Chicago North Shore & Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate certificate and order will be issued, effective 35 days from date of service, dismissing the complaint in No. 33337, and, in Finance Docket No. 20245, setting forth suitable provisions for the revocation of concurrences and powers of attorney, the cancellation of tariffs, and the submission of journal entries.

COMMISSIONER TUCKER did not participate.

317 I.C.C.

APPENDIX I

Chicago North Shore & Milwaukee Railway increase or decrease in revenue passengers carried, 1960 over 1959 and July 30, 1961 over 1960

Month	Passengers carried		Increase or (decrease)	Percentage
	Year	Year		
	1960	1959		
January	437,354	451,805	(14,451)	(3.2)
February	434,617	416,012	18,605	4.5
March	462,256	441,868	20,388	4.7
April	433,896	420,742	13,153	3.1
May	428,730	421,153	7,597	1.8
June	427,944	430,235	(2,291)	(0.6)
July	415,309	447,338	(32,029)	(7.2)
August	423,145	428,267	(5,122)	(1.1)
September	408,218	423,879	(15,661)	(3.7)
October	428,591	446,340	(17,749)	(4.0)
November	415,322	439,817	(24,495)	(5.6)
December	415,252	461,281	(46,029)	(10.0)
Total	5,140,661	5,228,338	(87,677)	(1.7)
	1961	1960		
January	392,525	437,354	(44,829)	(10.3)
February	383,798	454,617	(70,819)	(15.3)
March	398,689	462,256	(63,567)	(14.2)
April	369,217	433,895	(67,678)	(15.6)
May	371,969	428,730	(56,761)	(13.2)
June	369,099	427,944	(58,845)	(13.7)
July	350,833	415,309	(64,446)	(15.5)
7-monthly total	2,611,180	3,060,125	(426,945)	(14.1)

APPENDIX II

Location of stations on the Chicago & North Western Railway and on the Chicago, Milwaukee, St. Paul and Pacific Railroad with reference to location of nearest stations of Chicago North Shore and Milwaukee Railway

(1) North Shore stations	Distance	(2) C. & N.W. Ry. stations	Distance	(3) C., M., St. P. & P. RR. stations
	Miles		Miles	
Milwaukee, Wis.	1	Milwaukee	0.25	Milwaukee.
Racine, Wis.	2	Racine		
Kenosha, Wis.	1.37	Kenosha		
Zion	1	Zion		
Waukegan	0.9	Waukegan		
North Chicago Junction	0.47	North Chicago		
Downing	0.68	Great Lakes		
Lake Bluff	0.17	Lake Bluff		
Deerpath	1.3	Lake Forest		
Sheridan Elms	1.9	Fort Sheridan	1.4	West Lake Forest.
Highwood	1.4	Highwood		
Briergate	1.8	Highland Park	1.9	Deerfield.
Woodridge	2	Ravina		
		Braeside		
Northbrook	2	Glenco	2	Northbrook.
		Hubbard Wood		Techny.
Northfield	2.3	Winnetka		
		Indian Hill		
		Kenilworth		
Glenayre	2.3	Wilmette	2.4	Glenview.
Harmswood	2.7	Evanston	2.2	Golf.
Shakia	4	Davis Street	2.1	Morton Grove.

Explanation: Where no station is shown under column (3) there is no station near applicant's line. Where no station is listed in column (1), distances between stations are not of record. All points named are in Illinois, except as indicated.

APPENDIX III

Table from brief of protestant North Shore Commuters' Association, Inc., entitled "Basis for continued operation of the North Shore without loss."

Available savings:		
(1) Revised operating plan (Weston's savings)	$400,778	
(2) Discontinue train No. 431	2,953	
(3) Abolish charter bus	11,358	
(4) Abolish Kenosha tower post	18,308	
(5) Six accounting department employees	24,962	
	458,359	
(6) Less revenue loss from 300 trains and No. 19	5,498	
Net savings		$452,861
Present loss:		
(7) As reported, from June 1, 1960–May 3, 1961	437,621	
(8) Less backpay for prior period	38,232	
(9) Less passenger revenue excluded	19,840	
Adjusted loss		379,549
Net income		73,312

Above table, with adjustments as explained in report

Available savings:		
(1) Revised operating plan	$318,877	
(2) Discontinue train No. 431	2,953	
(3) Abolish charter bus	(1)	
(4) Abolish Kenosha tower post	(1)	
(5) Six accounting department employees	(1)	
	321,830	
(6) Less revenue loss from 300 trains and No. 19	5,498	
Net savings		316,332
Present loss:		
(7) As reported, from June 1, 1960–May 31, 1961	437,621	
(8) Less backpay for prior period	38,282	
(9) Less passenger revenue excluded	(1)	
Adjusted loss		399,339
Net loss		83,007

[1] Eliminated.

APPENDIX IV

Table from brief of protestant Illinois Commerce Commission to demonstrate how Chicago North Shore & Milwaukee Railway can be operated without loss

North Shore figures:	
Book loss, 12 months ended May 31, 1961	$437,621
Less backpay for prior period	38,232
	399,389
Plus adjustment to reflect "normal maintenance"	324,000
Total net loss (adjusted)	723,389
Protestants' figures:	
Weston's savings	400,788
Robertson's savings (eliminating overlap with Weston)	85,430
4-Point program savings and increased fares	373,000
Martin savings	24,962
	886,180
Net income	162,791

Above table, with adjustments as explained in report

North Shore figures:	
Book loss, 12 months ended May 31, 1961	$437,621
Less backpay for prior period	38,232
	399,389
Plus adjustment to reflect "normal maintenance"	324,000
Total net loss (adjusted)	723,389
Protestants' figures:	
Weston's savings	318,877
Robertson's savings	55,764
4-Point program savings and increased fares	64,160
Martin savings	[1]
	438,801
Net loss	284,588

[1] Eliminated.

F-9198

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 20245

CHICAGO NORTH SHORE & MILWAUKEE RAILWAY ABANDONMENT OF ENTIRE OPERATION

Decided October 15, 1962

1. Upon reconsideration, findings of the prior report after further hearing of May 10, 1962, supplemented and affirmed. Certificate and order modified and made effective 15 days from date of service hereof. Prior reports 312 I.C.C. 99 and 317 I.C.C. 191.
2. Motion and petitions of protestants for deferral of the effective date of the certificate and order for a period not less than 60 days from the date of disposition of petitions for reconsideration, denied.

Additional appearance: *S. J. Gromfine* for protestant railway labor organization.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

Our prior report after further hearing of May 10, 1962, 317 I.C.C. 191, found, subject to a condition hereinafter described, that the present and future public convenience and necessity permit abandonment by the applicant Chicago North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.[1] The effective date of our certificate and order giving effect to those findings has been postponed pending disposition of petitions for reconsideration filed by protestants.[2]

By a separately filed motion the State of Illinois and others request modification of our certificate and order, if adhered to, so that it will not become effective until a specified period, not less than 60 days, after disposition of their petition for reconsideration. Substantially the same relief is requested by the petitions of the city of Milwaukee and of the State of Illinois and others. The petitions are granted to the extent they seek reconsideration.

[1] The prior report and order of May 10, 1962, embraced and dismissed the complaint in No. 33337. The petitions considered herein make no reference to that proceeding, nor request reconsideration of our action thereon.

[2] Illinois Commerce Commission, North Shore Commuters Association, Chicago-Milwaukee Area Transportation Council and 10 cities and villages, jointly; the city of Milwaukee, Wis.; Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO; and the Brotherhood of Steamship Clerks, Freight Handlers, Express and Station Employees and other labor organizations, jointly.

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We find no merit in petitioners' arguments that we erred in finding that applicant's present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation. The basis for this finding is adequately set forth in the prior report.

Petitioners question our jurisdiction to issue a certificate authorizing abandonment of applicant's line. First, they contend that applicant is an interurban electric railway not operated as a part of a general steam railroad system of transportation, within the purview of section 1(22) of the Interstate Commerce Act, and that, thus, abandonment of its lines is excluded from our jurisdiction.

In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I.C.C. 99, referred to our earlier decision in *Chicago N.S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the same question was presented. That decision contains a complete and comprehensive discussion of the applicable law and facts as related to the indicated contention, including a discussion of the cases relied upon by petitioners.

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago N.S. & M. Ry. Abandonment*, *supra*. It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (page 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet and Eastern Railway Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, and the Chicago and North Western Railway Company, and it continues to participate in more than 1,000 tariffs with class I trunkline carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. And, as we stated therein:

> From what has been said by this Commission and the courts in subsequent decisions, it also seems clear that the decision of the Supreme Court in *United States* v. *Chicago, N.S. & M.R. Co.*, *supra*, holding the applicant's predecessor an interurban electric railway within the exemption clause of section 20a of the Interstate Commerce Act is not binding in this proceeding.

From the above, we conclude that applicant does not fall within the exemption contained in section 1(22) of the Interstate Commerce Act, that it is subject to section 1(18) of that act, and that the application under consideration in this proceeding is a matter within our jurisdiction.

Petitioners also contend that, even if the applicant is subject to the provisions of section 1(18), we are without jurisdiction to authorize it to abandon intrastate service but are limited to authorizing abandonment as to interstate commerce, relying principally upon the decision of the United States Supreme Court in *Texas* v. *Eastern Texas R. Co.*, 258 U.S. 204. The facts in the cited case differ from those present here. There, the Court referred to the fact that the railroad involved was located entirely within the State of Texas and was owned by a Texas corporation, and it found that the situation and ownership of the road were such that interstate and foreign commerce would not be burdened or affected by the continuance of intrastate business over the line.

In a later decision, *Colorado* v. *United States*, 271 U.S. 153, the Court sustained our action in authorizing the total abandonment of a branch line, located wholly within Colorado, of a railroad whose system was located partly in Colorado and partly in other States. In referring to the fact that the railroad involved therein, like most other railroads, was chartered to engage in both intrastate and interstate commerce, the Court made the following statement:

> The same instrumentality serves both [intrastate and interstate commerce]. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole.

After noting the statutory exemptions from Federal control contained in section 1(22), with respect to spur, industrial, team, switching, and sidetracks, the Court stated that "as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

The Court further stated that while the constitutional basis to issue a certificate of abandonment is the power of Congress to regulate interstate commerce, the statute does not make the issuance of a certificate of abandonment conditional upon a specific finding that continued operation will result in discrimination against interstate commerce or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier. Under the statute, the sole test prescribed is that abandonment be consistent with public convenience and necessity, and in its determination the

"Commission must have regard to the needs of both intrastate and interstate commerce." In discussing this, the Court indicated that an application for abandonment rarely involves an actual conflict between the needs of interstate and intrastate commerce. But wherever such conflicting needs exist, "the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands." In that balancing, "the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

We consistently have construed the *Eastern Texas R. Co.* case, *supra*, to apply only to abandonments of an entire line of railroad located within one State and not operated as a part of an interstate railway system.[3] In such class of cases, our certificates have authorized only abandonment of operations in interstate or foreign commerce. (*Grand River Valley R. Co. Abandonment*, 202 I.C.C. 359; *Nezperce & I.R. Co. Abandonment*, 257 I.C.C. 81.) On the other hand, we consistently have asserted exclusive jurisdiction to authorize complete abandonment of a line of railroad in the following classes of cases: (1) Abandonment of a portion of a line of railroad by an applicant operating solely within a single State (*Detroit & M. Ry. Co. Abandonment*, 138 I.C.C. 576); (2) abandonment of a line wholly within a State by a carrier which operates a railroad in more than one State or which is a part of a system operating in more than one State (*Chesterfield & L.R. Co. Receivers Abandonment*, 244 I.C.C. 20); and (3) abandonments, as in the instant case, involving a line operated in more than one State (*Tonopah & T.R. Co. Abandonment*, 236 I.C.C. 265; *Missouri & A. Ry. Co. Receivers Abandonment*, 271 I.C.C. 171).

Applicant's line physically crosses the State boundary between Wisconsin and Illinois and it operates in both States, handling passengers, baggage, and freight in intrastate and interstate commerce. Interline tickets are sold for transportation to and from points on its system, and because of its connections with other interstate railroads, as heretofore mentioned, it is able to participate in freight bridge traffic. Its intrastate and interstate operations are commingled and are being conducted as part of the same service. In finding that public convenience and necessity permit the abandonment, we necessarily considered the entire operation and the needs

[3] At first blush, the decision in *Joy Street Connecting R. Abandonment of Entire Line*, 307 I.C.C. 137, may seem inconsistent with the stated principle. However, in that case, although the railroad tracks involved were located solely within one State, the applicant's car float and lighterage operations extended into another State.

of the public for both interstate and intrastate service. As we stated in our prior report after further hearing, all of applicant's present revenues from both interstate and intrastate operations are not sufficient to maintain the facilities necessary to safety of operation. It is obvious that revenues from intrastate operations alone would be insufficient to permit continued safe operations.

It was also shown in our last report that the Chicago & North Western Railway Company, hereinafter called the North Western, serves the considered area between Milwaukee and Chicago, its tracks being located slightly west of and generally parallel to the main line of applicant. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee, also operates in this area. Although it does not have comparable stations at all of the points served by the other two carriers, its line is located slightly east of the applicant's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. The North Western has spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains. It sustained deficits amounting to approximately $2 million on these operations in 1958–59 and, like applicant, has been faced with the problem of declining patronage.

Each of the three railroads operating in this area are competitive for certain of their passengers moving in intrastate as well as interstate commerce. It is clear that the traffic is not sufficient to support all on a reasonably profitable basis. If applicant continues operations, either on the present basis or solely in intrastate commerce, it will carry passengers who otherwise would patronize the North Western or Milwaukee. Th , the ability of those railroads to continue their present operations in interstate or foreign commerce should be improved by the proposed abandonment by applicant.

It also is important to note that a certificate issued by us authorizing abandonment is permissive and, at applicant's election, the authority granted may or may not be exercised. If our certificate were limited to abandonment of operations in interstate and foreign commerce and the applicant were compelled by the States to continue intrastate operations over separate segments in Illinois and Wisconsin, the economics of the situation would dictate that applicant continue its interstate operations in order to minimize its losses. This would be so notwithstanding our finding that applicant's revenues are such as to make it difficult for a carrier to maintain its facilities in a manner that would insure safe operations. The likely result would be the safety of interstate as well as intrastate passengers would be endangered.

We conclude that the continued operation of the applicant's line, even if confined to intrastate commerce, would constitute an undue burden upon interstate commerce. However, as the Court pointed out in the *Colorado* case, *supra*, the Commission's jurisdiction under section 1(18) of the act is not limited to operations in interstate commerce and to such intrastate operations as may be found to impose an undue burden on interstate commerce. 271 U.S. at page 164. Section 1(18) is not limited to the abandonment of interstate operations but by its terms includes "all or any portion of a line of railroad" subject to part I of the act. Furthermore, paragraph 20 of section 1 provides that from and after issuance of the certificate, the applicant may proceed to abandon "without securing approval other than such certificate." When the Commission finds that the public convenience and necessity permit the abandonment of an entire line of railroad located in more than one State, the States involved cannot frustrate that action by requiring a continuance of intrastate operations. While the existence of an undue burden on interstate commerce properly may be used to state or to justify a particular result, it is not necessary for the Commission to find such a burden where, as here, regulation of the intrastate activities in question is a necessary and proper consequence of effective exercise of the power to regulate interstate commerce. *Cf. Colorado* v. *United States*, *supra*.

For the reasons referred to in our report of May 10, 1962, we determined that no conditions should be imposed for the protection of applicant's employees. The petitioning labor organizations contend that we have recently changed our views respecting the imposition of conditions in cases where an entire line of railroad is permitted to be abandoned, citing the action taken in Finance Docket No. 21499, Savannah Union Station Company Abandonment of Entire Line.

In the report of the Commission, division 3, acting as an appellate division, in Finance Docket No. 21498, *Seaboard Air Line R. Co. Trackage Rights*, 312 I.C.C. 797, decided April 25, 1962, which embraced Finance Docket No. 21499, division 3 imposed conditions similar to those prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271. However, the facts in those proceedings differ substantially from those in the present proceeding. There, it was found that the proposed abandonment was an inseparable part of a plan of operation, the effectuation of which required our approval under section 5(2) as well as a certificate under section 1(18). Also, the abandoning railroad was controlled by, and in reality an instrumentality of, the railroads involved in the related section 5 proceeding. We affirm our conclusion that no conditions should be imposed for the benefit of employees.

Our certificate and order of May 10, 1962, was made subject to the following condition:

> that applicant shall sell the entire line, or any portion thereof, to any responsible person, firm or corporation offering, prior to the effective date of the certificate and order permitting abandonment, to purchase the same for continued operation (upon approval of this Commission) at a price not less than the net salvage value of the property sought to be acquired; * * *.

We are requested to postpone the effective date of our certificate and order for a period of not less than 60 days after disposition of the considered petitions, to permit time for judicial review of our action and to permit the making of financial and other arrangements for purchase, reorganization, and continuance of this important rail service and determination of the salvage value of the property to be acquired. Whether the effectiveness of our certificate should be deferred pending judicial review is a matter which properly may be left to the court having jurisdiction. Considering all the circumstances, including the substantial losses being incurred by the applicant from continued operations and the absence of any offer to indemnify it against additional losses, we are of the view that it would be unreasonable for us to further defer the effective date pending the making of financial arrangements and the determination of a price for any of the property sought to be acquired. This proceeding has been pending for 4 years, and more than 5 months have elapsed since issuance of our certificate and order. Nevertheless, we are not apprised of any substantial steps being taken toward the making of necessary financial arrangements to purchase all or a part of the line, nor are we informed that any of the protestants have any intention of making an offer therefor. It is not necessary that the price be definitely ascertained before an offer is made. Under the condition imposed, applicant will be obligated to sell at a price "not less than the net salvage value." The price subsequently may be determined by arbitration. The condition previously imposed is supplemented to provide that, if agreement respecting the price cannot be reached by the applicant and a person, firm, or corporation offering to purchase all or part of the property, the amount payable shall be subject to determination by an arbitration committee selected in the following manner: One to be selected by the applicant and the person offering to purchase the property, respectively, and these two shall endeavor by agreement within 10 days after their appointment to select a third member or to select some person authorized to name the third member. Upon their failure to agree, the third member may be named by the Chairman of this Commission. A decision of the majority of the committee shall be required, and such decision shall be final and conclusive. Fees and expenses of the third member, and the

expenses of the committee, shall be borne equally by the parties. All other expenses shall be paid by the party incurring them, including the compensation of the member selected by such party.

Contentions of the petitioners not specifically discussed herein have been considered and found to be without merit.

Subject to the condition respecting sale of the property, supplemented in the respects described above, we affirm our prior finding that the present and future public convenience and necessity permit abandonment by the Chicago, North Shore and Milwaukee Railway of its entire line of railroad in Milwaukee, Racine, and Kenosha Counties, Wis., and Lake and Cook Counties, Ill.

An appropriate order will be entered.

COMMISSIONERS FREAS AND HERRING concur in the result.

COMMISSIONER TUCKER did not participate.

317 I.C.C.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. 937

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APR 15 1963
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In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION,
APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO NORTH SHORE & MILWAUKEE RAILWAY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

ROBERT W. GINNANE,
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Interstate Commerce Commission
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 937

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and NORTH SHORE COMMUTERS ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO NORTH SHORE & MILWAUKEE RAILWAY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order granted the Chicago, North Shore & Milwaukee Railway ("North Shore") a certificate of public convenience and necessity permitting abandonment of its entire line of railroad extending between Milwaukee, Wisconsin, and Chicago, Illinois.

On June 25, 1958, the North Shore applied to the Commission under Section 1(18-20) of the Interstate Commerce Act, 49 U.S.C. § 1(18-20), for a certificate of public convenience and necessity permitting abandonment. Appellants filed motions to dismiss, challenging the jurisdiction of the Commission. Appellants asserted that the North Shore was not subject to Commission regulation as to abandonment by virtue of the exemption of "street, suburban, or interurban electric railways which are not operated as a part of parts of a general steam railroad system of transportation" in Section 1(22) of the Act, 49 U.S.C. § 1(22).

On May 4, 1960, the Commission issued its interim report, 312 I.C.C. 99 (extract appears at J.S. xxx-xxxii). The Commission overruled the motions to dismiss, but determined to defer action on the application for a trial period of one year to afford the North Shore, in cooperation with local groups, an opportunity to explore all possibilities for profitable operation.

On May 10, 1962, the Commission issued its report after further hearing, 317 I.C.C. 191 (extract appears at J.S. xxvii-xxviii). The Commission found that "the present revenues have not been, and future revenues will not be, sufficient to cover the cost of applicant's continued operation with sufficient maintenance of facilities necessary to safety of operation . . .", and that the present and future convenience and necessity permit the abandonment by the North Shore of its entire line of railroad. (317 I.C.C. 200, J.S. xxviii). The Commission directed that an appropriate certificate and order be issued,[1] to take effect and be in force from and after 35 days from the date of service.[2]

On October 15, 1962, the Commission issued its report on reconsideration, 317 I.C.C. 363 (extract appears at J.S. xix-xxvi). The Commission considered and rejected appellants' contentions that the North Shore was an interurban electric railway within the meaning of Section 1(22), and that, even if the Commission had jurisdiction to grant a certificate to the North Shore permitting abandonment,

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[1] The certificate granted by the Commission was made subject to a condition respecting sale for continued operation (J.S. xxix). This condition is not at issue in this proceeding.

[2] The effective date of the Commission's certificate and order was extended by the Commission until November 2, 1962. (J.S. xxvi-xxvii). The North Shore voluntarily postponed abandonment until after decision had been rendered by the district court. The North Shore has filed with the Commission revocation of concurrences and cancellation of appropriate tariffs bearing the effective date for cessation of operations of January 21, 1963.